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Collective Bargaining Bulletin

A REVIEW OF CONTRACT NEGOTIATION AND ADMINISTRATION

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Highlights

In the Manual

Sample Contract Language
A cash profit-sharing plan is added at 10:2321, and a team-based incentive plan is added at 10:2351.

Contract Settlements
Terms of settlements reported Sept. 14-27 and weighted average, average, and median wage increases are in *Table of Contract Settlements* at 19:4181.

Mechanics at Southwest Airlines Approve Extension Providing Bonuses, Stock Options

Members of the Aircraft Mechanics Fraternal Organization approved a three-year contract extension with Dallas-based Southwest Airlines that provides 1,517 workers with 3 percent wage increases each year, the independent union said Sept. 15.

The agreement, extending the contract from its Aug. 16, 2005, amendable date to Aug. 16, 2008, raises hourly base pay for newly hired mechanics from $18.94 to $20.70 over term, pay for mechanics with five years' seniority from $32 to $34.97, pay for inspectors and lead mechanics from $33.92 to $37.07, and pay for lead inspectors from $35.84 to $39.17.

In addition to pay increases, the agreement calls for profitability bonuses of up to 3 percent of employees' gross salary each September if the airline's adjusted operating margin is between 9 percent and 15 percent, and a one-time grant of 600 fully vested stock options.

The ratification vote was ''relatively close,'' the union said, reflecting job security concerns among some members. ''A great number wanted to go in and negotiate better job protections. The agreement is purely economic.''

Southwest praised the ratification. ''Our visionary, entrepreneurial mechanics have shown, once again, that they are prepared to lead Southwest Airlines through the unprecedented turbulence facing our industry.''

Five-Year Contract at Alabama Power Calls for Incentive Pay, Two-Tier Bidding

A five-year contract with Alabama Power Co. that provides about 2,800 workers with wage increases totaling 16 percent and adds an incentive pay program was ratified Sept. 14 by International Brotherhood of Electrical Workers members.

Workers will receive 3 percent wage increases in each of the first three years of the contract and 3.5 percent increases in the fourth and fifth years. In addition, workers are covered under an incentive pay plan based on financial rewards for meeting company goals, and night shift differentials are increased. Under the prior contract, wages ranged from $11.39 per hour for entry-level helpers to about $25 per hour for lead linemen, IBEW said.

Both Alabama Power and IBEW-represented workers will continue to contribute the same percentage to cover health care costs, with employees paying 27 percent of the premiums. However, because health care costs have increased overall, premium costs will increase 8.2 percent for both the company and employees, the company said. Employees' costs will increase by about $6 per month for individual coverage and about $16 per month for family coverage. For example, monthly premiums for family standard option coverage are $199.70 in 2004 and will rise to $216.10 in 2005.

The new contract provides two-tiered bidding rights for transferring from one generating plant to another across the state, the union said, meaning new hires will not be allowed to bid out, but existing employees will retain that

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right. As training has become more extensive at new plants, the company wanted to protect its training investment in workers by preventing them from moving to older plants where the training they have received is not needed. The union sought to protect workers' seniority rights in the bidding process.

Other changes allow workers to take up to 40 hours per year of their sick leave to care for a family member who is sick, and reinstate the provision of uniforms for most union-represented workers, a benefit done away with in the previous contract.

Jewel, UFCW Negotiate Lump Sums for 4,100 Workers

A new 54-month contract between Jewel Food Stores Inc. and the United Food and Commercial Workers includes three lump-sum payments over term and requires employee contributions toward health insurance premiums for the first time. The contract, covering about 4,100 meat, deli, and seafood employees at 90 Chicago-area stores, was ratified Aug. 27.

Employees hired before November 1988 will in January 2005 receive a bonus of 25 cents per hour for the total number of hours paid for work, vacation, and holidays during Jewel's 2004 payroll year.

In addition, each worker with more than six years' service will receive a lump sum in March 2007 calculated by dividing $840,000 by the total number of hours paid for work, vacation, or holidays during the 2006 payroll year, and multiplying that figure by the worker's total hours. A similar lump sum due in March 2008 will divide $500,000 by the number of paid hours in the 2007 payroll year.

Members of the Communications Workers of America at BellSouth Corp. facilities in nine states have ratified six contracts covering about 44,000 workers, the union announced Sept. 28. The settlement calls for pay increases totaling 10.5 percent, employee eligiblity for incentive pay, continued employer-paid health care for workers and retirees, and extension of contract coverage to new technology services (9 COBB 97, 8/19/04).

Guaranteed overtime of up to nine hours per week for market managers will be phased out by Jan. 1, 2007, and guaranteed overtime of up to two hours per week for assistant market managers will be eliminated by Jan. 2, 2005.

Employees hired after ratification will be paid straight time for working Sundays, unlike the time-and-one-half received by workers hired before ratification. However, beginning March 4, 2007, employees hired after ratification will receive a Sunday hourly premium of $1 after 13 months of service, $1.50 after 25 months, and $2 after 37 months.

First-time weekly health care contributions for workers hired before ratification are $4 for single coverage and $8 for family coverage, rising gradually to $14 for single coverage and $28.50 for family coverage in June 2007. For new hires, weekly contributions are $8 for single coverage and $19.97 for family coverage initially, rising to $14 and $30.97, respectively, in June 2007. All employees will pay $16 per week for single coverage and $33.97 for family coverage beginning in June 2008.

In addition, part-time workers are eligible for health care coverage after six months of service, compared with 24 months under the prior accord.

Delta Pilots Who Retired Early Allowed to Fly Limited Amount

Under an agreement designed to avoid a pilot shortage at Delta Air Lines that could disrupt operations or hasten bankruptcy, pilots who retired early will be able to fly Delta planes for a limited time. The agreement was approved by Air Line Pilots Association members, the union announced Sept. 28.

Some pilots have retired early and claimed part of their pension benefits because of worries that the money will be lost if Delta files for bankruptcy. Pilots can take half of their pension in a lump sum, while the remainder is paid out over a number of years, according to the company.

The agreement assures that Delta will make no attempt to take away any accrued benefits, and that the airline ''will not file to terminate the pilots' pension plan before Feb. 1, 2005, even if the company files for bankruptcy prior to this date,'' according to the union.

Other details of the agreement include a requirement that eligible pilots be ''captain-qualified'' and able to fly Delta's newer and larger planes. Delta management can use retired pilots if pilot manpower is at or below 110 percent of what is needed to fly the airline's routes. The pilots will be randomly selected.

Post-retirement pilots will hold their seniority, but have lower bidding rights for flights than active and furloughed pilots, ALPA said. Such

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pilots will be paid at the 12-year rate of pay but not accrue any further benefits under the pension plan. In addition, post-retirement pilots can collect their retirement benefits while they continue to work.

The agreement came as the parties continue negotiations on pay and benefit concessions by pilots to help the financially ailing carrier.

New York Times Contract Slashes Number of Pressmen

Members of the New York Newspaper Printing Pressmen have ratified a new 13-year contract covering about 500 pressmen employed by the *New York Times* that will allow management to cut pressroom staffing by nearly half, the newspaper told BNA Sept. 16.

Reductions will be accomplished in two phases, with current staffing cut by 37 percent immediately and by an additional 9 percent in 2010.

However, no layoffs of regular employees are planned, the company said. The newspaper regularly employs pressmen from other New York newspapers—the *New York Post* and the *New York Daily News*—to bolster the number of *Times* employees needed, and will achieve cuts by curtailing outside hiring.

The employer also will offer a voluntary retirement incentive program to eligible employees.

The new contract expires March 30, 2017, and replaces an agreement that had been set to expire March 30, 2005. Annual wage increases of 3 percent negotiated in the previous contract will extend through March 2007, and annual increases of 2 percent will be paid in the final 10 years. In addition, a one-time bonus payment will be made this year to all pressmen.

Unions, Rail Employers Oppose Proposed Arbitration Changes

Unions representing railway workers and an association of railroad employers Sept. 20 urged the National Mediation Board to abandon most or all of its proposed regulations to speed resolution of labor grievances in the industry.

NMB has said the current system of rail arbitration, which is overseen by three independent boards under the Railway Labor Act and funded by NMB, lacks incentives or ''teeth'' to encourage parties to resolve cases within their one-year goal. As a result, it is not uncommon for cases to remain unresolved for two years.

NMB's proposed rules, issued Aug. 9 (9 COBB 99, 8/19/04), seek to resolve cases by imposing a one-year deadline that would be enforced by not paying arbitrators who fail to complete cases within a year. The rules also would impose filing fees for grievances and other disputes and enable NMB's director of arbitration services to order the National Railroad Adjustment Board and two other boards to consolidate pending cases.

Both labor and employer groups said NMB lacks the legal authority to determine or interfere with the three boards' procedural rules for resolving grievances and other disputes.

They argued that contrary to NMB's interpretation of the Railway Labor Act as amended in 1934, a provision of the law that requires the board to pay arbitrators does not give it any power over case procedures, scheduling, or consolidation.

The Railway Labor Act does not authorize NMB to place conditions, such as a one-year deadline, on compensation of arbitrators or to adopt procedural rules for the NRAB and other boards that oversee the mandatory arbitration system, the Rail Labor Division of AFL-CIO's Transportation Trades Department said.

Major railroads represented by the National Railway Labor Conference also said NMB's proposals exceeded its authority, although commenting employers said the board does have the power to impose filing fees for grievances and arbitration requests.

The board declined comment on the criticisms.

New Union Leaders Chosen At Two Transportation Unions

Michael O'Brien Sept. 21 succeeded Sonny Hall as president of the 135,000-member Transport Workers Union, the union announced. O'Brien, who had been serving as TWU's executive vice president, will serve out the remainder of Hall's term, which runs through October 2005.

Meanwhile, the 39,000-member Brotherhood of Maintenance of Way Employes Sept. 16 filled vacancies in its two top offices, electing Freddie N. Simpson as president and Perry K. Geller Sr. secretary-treasurer, the union said. Simpson was secretary-treasurer before taking over the top post on an interim basis in April.

News in Brief

State Worker Salary Hikes Plummet

Salary increases for state government workers decreased dramatically between 2003 and 2004, according to a report released Sept. 6 by the American Federation of Teachers. AFT studied 44 professional and scientific career job titles, and found that the average salary increase for 2003-2004 was 0.45 percent, compared with an average 3.63 percent increase in 2002-2003. Workers in states with collective bargaining rights tended to earn higher salaries and higher raises, according to AFT: of the 44 job titles studied, 41 earned more in states with collective bargaining, and the weighted mean salary for public employees in collective bargaining states is 20 percent higher than the salary in states that do not permit public employee bargaining. The study is available at http://www.aft.org/salary/2004/download/aftpe04survey.pdf.

Compensation Up in Second Quarter

Total employee compensation paid by private sector employers rose 0.5 percent in the second quarter of 2004 to an average of $23.41 per hour, according to figures released Sept. 15 by the Bureau of Labor Statistics. Benefit costs rose 4 cents, or 0.6 percent, from $6.65 per hour in the first quarter to $6.69 per hour in the April-June period, while wages and salaries increased 0.4 percent, from $16.64 per hour to $16.71 per hour. Total compensation for union-represented employees was $32.04 per hour, compared with $22.38 per hour for nonunion workers. The BLS report is available at http://www.bls.gov/news.release/pdf/ecec.pdf.

Construction Pay Steady Over Year

First-year wage and benefit increases in construction contracts negotiated to date this year averaged 4.1 percent or $1.44 an hour, little changed from increases of 4.1 percent or $1.36 an hour negotiated in the same period a year ago, Construction Labor Research Council data released Sept. 20 show. Second-year wage-benefit raises averaging 3.9 percent or $1.48 an hour and third-year raises averaging 3.7 percent or $1.43 an hour also were about the same as increases bargained a year ago. Contact CLRC at (202) 467-5680.

Facts & Figures

Employment Outlook Continues to Show Improved Prospects

Hiring plans for the final three months of 2004 continue to run ahead of last year's figures in most areas, based on projections from 119 employers responding to BNA's latest quarterly employment survey.

Employer demand for production and service workers is expected to rise again in the fourth quarter. Nineteen percent of employers are planning to add new staff from October through December, up from 16 percent in the third quarter of this year and from 14 percent recorded in the last quarter of 2003.

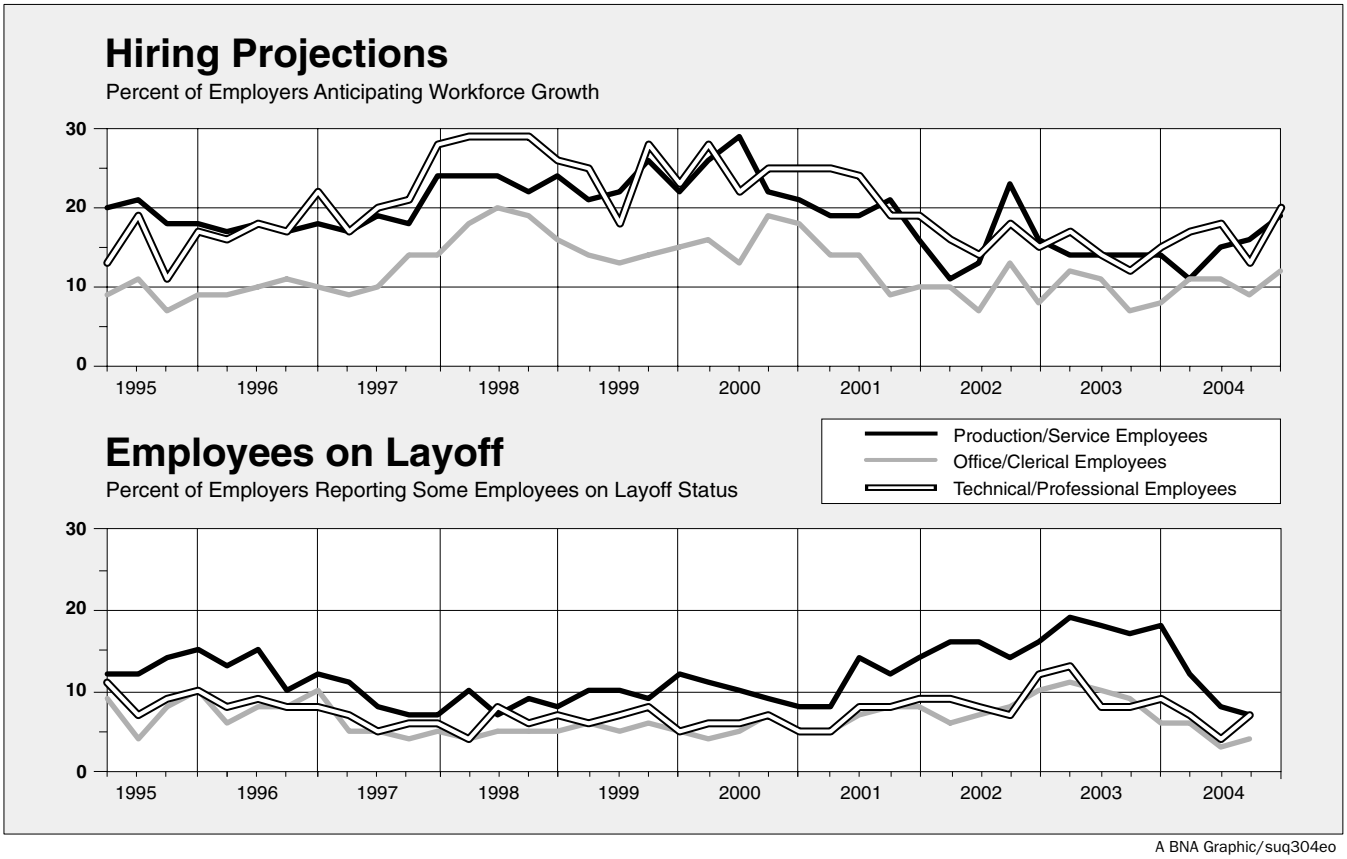
In contrast, projected hiring of office and clerical workers has remained relatively flat this year. Twelve percent of employers plan on adding positions in the coming quarter—virtually unchanged from 11 percent planning additions for each of the first two quarters of 2004, but a four-point increase over projections for the same period one year ago (8 percent).

Hiring plans for technical and professional workers are on the rebound in the final quarter of 2004. Twenty percent of responding organizations are looking to add new staff, up sharply from 13 percent last quarter. The 20 percent figure is in line with hiring projections for the first and second quarters of this year (17 percent and 18 percent, respectively) and represents a five-point increase over planned hires of professional and technical workers in the fourth quarter of 2003 (15 percent).

A comparison of ''net'' hiring projections (positions to be added minus positions to be cut) for fourth-quarter 2003 versus fourth-quarter 2004 shows gains for each of the three major employment categories. Over the one-year period, net hiring increased 10 percentage points for production and service employees, 7 points for office and clerical employees, and 13 points for professional and technical employees.

In line with net increases in hiring projections are declines in the percentage of workers on layoff. Employers with production and service workers on layoff fell from 17 percent in July and August 2003 to 7 percent during the same two-month period this year. There also has been a moderate decline in the percentage of organizations with office and clerical positions on layoff (from 9 percent to 4 percent), and a marginal decline in organizations with professional and technical employees on layoff (from 8 percent to 7 percent).

For more information, call BNA PLUS at 800-452-7773 or in Washington, D.C., call (202) 452-4323.



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Arbitrating the Contract

Firm Cannot Require Use Of Vacation for FMLA Leave

A dispute arose after an employer issued a Family and Medical Leave Act policy requiring that employees first substitute all earned vacation days for any FMLA leave.

The union filed a grievance, arguing that the policy violated a contract provision that stated ''[n]o employee shall be required to utilize paid vacation days . . . for any FMLA absence unless that employee requests to receive such pay.''

The employer maintained that noneconomic and economic portions of the contract were negotiated separately, and the provision cited by the union was boilerplate language the union knew could lose relevance, depending on economic terms reached later. In addition, the company said there were no ''paid vacation days'' inasmuch as employees received vacation pay once a year by a lump-sum check in May.

Award: An arbitrator sustained the grievance (*Dura Convertible Sys.*, 119 LA 1700 (Allen, 2004)).

Discussion: While FMLA allows an employer to require an employee to substitute paid vacation leave for FMLA leave, it also provides that the act shall not be construed to diminish the obligation of an employer to comply with any collective bargaining agreement that provides greater family or medical leave rights to employees, the arbitrator said. The agreement in this case ''clearly provides an employee shall not be required to utilize paid vacation days for an FMLA leave of absence,'' and this ''nullified'' the contrary requirement in the employer's policy.

The language incorporated into a contract must be considered to have meaning, the arbitrator said. If it were mere boilerplate, it would have been easy for the parties to later delete it, but they did not do so.

The employer's unilaterally adopted FMLA policy could not ''alter the express language of the agreement,'' and the employer could not nullify employees' contractual rights without first bargaining, the arbitrator held. He also concluded that employees' receipt of vacation pay by a lump-sum payment did not negate the fact that they were paid for their vacation leave time and did receive ''paid vacations.''

Pointers: Several arbitrators have issued decisions in cases involving worker rights under contracts and FMLA.

For example, one arbitrator found that a contract provision stating that workers shall notify management of their desire to use earned paid leave in lieu of uncompensated leave granted workers the exclusive right to substitute paid vacation and/or personal leave for unpaid FMLA leave, and that any unilateral policy to the contrary ''must be found void and in violation of the CBA [collective bargaining agreement]'' (*Union Hospital*, 108 LA 966 (Chattman, 1997)).

Another arbitrator ruled that an employer could not require employees to exhaust vacation leave before using FMLA leave, where a contract provision granted employees the right, subject to restrictions not relevant to the case, to take their vacation whenever they wished (*Grand Haven Stamped Products*, 107 LA 131 (Daniel, 1996)).

An employer properly required an employee to use vacation leave before taking FMLA leave, an arbitrator held, finding that the law allowed it, there was a past practice of substituting accrued paid leave for FMLA leave, and a union proposal that employees ''may elect'' paid leave in lieu of FMLA leave ''but such will not be mandated by the Company'' was not adopted in bargaining (*Smith & Loveless*, 119 LA 1444 (O'Grady, 2004)).

In another case, an arbitrator ruled that an employer could unilaterally require employees to use vacation leave before taking FMLA leave, finding that this was an established past practice and the agreement gave the employer a broad right to schedule vacations ''in order to insure efficient production'' and also ''the final right to schedule vacations'' (*Ingersoll-Rand*, 118 LA 275 (Goldstein, 2003)).

The case discussion above is designed to illustrate how arbitrators resolve disputes. ''LA'' references are to BNA's weekly Labor Arbitration Reports*. For a summary of the FMLA text, see* Family and Medical Leave Act *at 7:1501; for discussion of leave under the act, see* Family and Medical Leave *at 14:301.*

Conferences

Contract Language: Working Within It, Making It Work for You, Nov. 1, New York, N.Y.; price: $595. Presented by Cornell University School of Industrial and Labor Relations, (212) 340-2802.

The Dynamics of Labor Negotiations, Nov. 1, Buffalo, N.Y.; price: $595. Presented by Cornell University School of Industrial and Labor Relations, (716) 852-4191.

Collective Bargaining: Tactics, Techniques and Table Manners, Nov. 1-3, Milwaukee, Wis.; price: $1,165. Presented by University of Wisconsin-Milwaukee, (414) 227-3200.

Preparation for Collective Bargaining, Nov. 2-3, Buffalo, N.Y.; price: $1,195. Presented by Cornell University School of Industrial and Labor Relations, (716) 852-4191.

Contract Negotiations, Nov. 6 and 13, Minneapolis, Minn.; price: $100. Presented by University of Minnesota Labor Education Service, (612) 624-5020.

Effective Collective Bargaining Skills and Strategies, Nov. 10-11, Buffalo, N.Y.; price: $1,295. Presented by Cornell University School of Industrial and Labor Relations, (716) 852-4191.

Employment Law Conference, Nov. 11-12, Chicago; Nov. 18, San Francisco; Dec. 2-3, New Orleans; Dec. 9-10, Washington, D.C.; price: $800. Presented by National Employment Law Institute, (303) 861-5600.

Advanced Collective Bargaining Workshop, Dec. 2-3, Milwaukee, Wis.; price: $1,195. Presented by the University of Wisconsin-Milwaukee, (414) 227-3200.

Negotiating Labor Agreements: New Strategies for Achieving Better Collective Bargaining Outcomes, Dec. 9-10, Cambridge, Mass.; price: $1,950, with group discounts. Presented by the Program on Negotiation at Harvard Law School, (781) 239-1111.

IRRA 57th Annual Meeting, Jan. 7-9, 2005, Philadelphia, Pa.; price: $55, $90 after Dec. 3. Presented by Industrial Relations Research Association, (773) 583-4050.

Legal Developments

Decisions on Impasse, Contract Interpretation Handed Down

A company illegally declared impasse and implemented what it called a final contract offer following a bargaining session at which it made significant changes to its offer, the National Labor Relations Board ruled Sept. 15 (*Duane Reade Inc.*, 342 N.L.R.B. No. 104, 9/15/04 [released 9/21/04]).

On Dec. 6, 2001, following several months of negotiations for a new contract covering union-represented employees, the company presented a comprehensive proposal that included its withdrawal from the union's vacation and fringe benefit funds, creation of new 401(k) and health insurance plans, and larger pay increases than previously proposed.

The union rejected the proposal because it considered it to represent a reduction in benefits, but offered to seek ways to reduce the costs of the union-sponsored benefit funds. It also made a counterproposal on wages. The company responded with what it termed its ''last, best, and final'' settlement offer with the same changes in benefits from its earlier proposal, plus additional wage increases. The union did not reject the offer but asked for time to review it. The employer implemented its contract proposal on Dec. 9.

Affirming a February 2004 finding by an NLRB administrative law judge, the board concluded that the parties were not at impasse in negotiations in December 2001 because there still was a chance they could reach an agreement.

Given the parties' actions on Dec. 6, including the new wage proposal, the company's request that its back contributions to the union benefit funds be excused, and the union's request for more time, ''we agreed with the judge that the parties had not yet exhausted the prospects for concluding an agreement,'' the board said. It ordered the employer to restore the terms and conditions of employment that existed prior to Dec. 9, 2001, and to make employees whole for any losses.

Reliance on State Law Improper

An arbitrator who reinstated an employee who had tested positive for marijuana following an accident should not have applied Oregon's medical marijuana law in interpreting a collective bargaining agreement, a federal judge ruled Sept. 15 (*Freightliner v. Teamsters Local 305,* D. Or., No. 03-1170, 9/15/04).

The employee obtained an identification card from the state because of his use of marijuana to control pain from a number of injuries. In December 2002, he was involved in an accident, in which he ruptured a water pipe while operating a forklift in a dimly lit area of the workplace.

No one was injured in the accident, but the company ordered the employee to take a drug test. He tested positive for marijuana, and was suspended and later dismissed after refusing to sign a last chance agreement.

The union filed a grievance, contending that while the employee might have tested positive, he was not impaired while on the job. The employee used marijuana every night to alleviate pain, but did not use it before work or on the job. The positive test established only that at some time prior to the test, the employee ingested marijuana and such evidence does not establish just cause.

The company argued that the positive drug test showed the employee was ''under the influence'' and subject to discipline under terms of the bargaining agreement. It argued that the worker's medical use of marijuana did not trump the company's drug policy, noting that the state's medical marijuana law does not require employers to accommodate medical marijuana use.

An arbitrator found that the company did not have just cause to terminate the employee. The ruling examined the medical marijuana law's provision stating that an employer is not required to accommodate medical use of marijuana in the workplace. This provision focuses on actual use of marijuana while on the job; it does not extend to what an employee does on his or her own time, according to the arbitrator.

The company filed a lawsuit in federal court, arguing that the arbitrator acted in disregard to the contract.

Criminal Law Not Transferable

In vacating the arbitrator's ruling, the court said the arbitrator improperly imposed a criminal statute on a private employment contract. The accommodation provision did not convert the criminal statute into a workplace rule and therefore an employer was free to discipline a worker for being under the influence even if there was no similar criminal sanction.

''It is entirely irrational and qualified as a manifest disregard of the law to assert that the workplace provision [protecting employers from accommodating marijuana use] makes it illegal for parties to a [bargaining agreement] to negotiate how an employer may discipline marijuana use,'' the court said.

The arbitrator ''gave lip service to the workplace provision, thus arguably 'recognizing' the law, but it is clear to the court that—to the extent he concluded that the provision made the [contract's] drug policy illegal—he 'ignored' the Act's manifestly limited reach,'' the court said.

It appeared that the arbitrator deemed the criminal prosecution language in the act as transferable to the workplace, the court said. Thus, the arbitrator essentially said that if a person cannot be penalized criminally for using medical marijuana, an employer should not be able to penalize employees who do so in the workplace, the court said. This logic, however, failed to recognize the limits of the law and its primary purpose.

''On its face, the Marijuana Act only aims to protect Oregon citizens holding valid marijuana prescriptions from criminal prosecution and prescribing doctors from civil penalties,'' the court said. ''Nothing in the Act even suggests that the Act was meant to limit private collective bargaining between employees and employers.''

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